RECENT CASE NOTES

APPEAL AND ERROR—DUE PROCESS—NEW ISSUE ON APPEAL.—In a trial before a justice of the peace, whose compensation depended upon convictions, the defendant was found guilty of violating the liquor statutes, and fined. Objections to the justice's disqualification on the grounds of interest were raised for the first time in the intermediate appellate court, where the judgment below was affirmed. On a writ of error to the supreme court, the defendant claimed that he had been denied "due process of law." *Held*, that no objection having been made in the trial court, a new issue could not be raised on appeal. *Tari v. State*, 159 N. E. 594 (Ohio, 1927).

Generally, on appeal no new issue may be raised. *Weinstein v. Laughlin*, 21 F. (2d) 740 (C. C. A. 8th, 1927). Lack of jurisdiction is a recognized exception to this rule. *O'Connor v. Slaker*, 22 F. (2d) 147 (C. C. A. 8th, 1927) (state's immunity from suit); *Ex parte Sifola*, 138 Atl. 369 (N. J. Eq. 1927) (trial in one state for crime committed in another). It has been said that constitutional questions may be brought up for the first time on appeal where capital charges are involved. *Hack v. State*, 141 Wis. 346, 351, 124 N. W. 492, 494 (1910). And constitutionality of a statute has been raised for the first time by an appellate court on its own initiative in an ordinary civil suit. *Kraus v. Lehman*, 170 Ind. 408, 83 N. E. 714 (1908). But such procedure is at least unorthodox. *Leontas v. City of Savannah*, 138 S. E. 154 (Ga. 1927); Martin, *A Notable Decision* (1908) 42 AM. L. REV. 641. The instant case arises in consequence of a recent Supreme Court decision that a trial before a judge whose fees are derived from convictions is a denial of due process. *Tumey v. State*, 273 U. S. 510, 47 Sup. Ct. 437 (1927); see Comment (1927) 36 YALE LAW JOURNAL 1171. There, however, the constitutional objection was raised at the trial and the present question was not involved. Other decisions subsequent to the *Tumey* case have likewise held that the disqualification of a judge upon constitutional grounds may not be raised for the first time on appeal. *Commonwealth v. Dabbierio*, 290 Pa. 174, 138 Atl. 679 (1927); *Bryant v. State*, 112 So. 675 (Miss. 1927). Yet a federal court has allowed such disqualification to be attacked collaterally in a petition for habeas corpus, although not raised at the first trial. *Ex parte Baer*, 20 F. (2d) 912 (Ky. 1927). On the assumption that the statute conferring *jurisdiction* was constitutional, and since a capital offense was not involved, the doctrine that a constitutional question must be raised at the earliest opportunity seems to have been properly invoked by the court in the instant case.

BILLS AND NOTES—FORWARDING CHECK TO DRAWEE—DUE PRESENTMENT—EFFECT OF BANK COLLECTION STATUTE.—The plaintiff gave the defendant a check in part payment for a tractor. The check was deposited on the next day and on the day following was forwarded to the drawee. Several days later the drawee failed without having paid, although it had had sufficient funds. The plaintiff, who had given a mortgage to the defendant as security for his supposedly unpaid debt, brought this action to enjoin foreclosure proceedings, contending that he had been discharged as drawer on the check. To show due presentment the defendant relied on a statute which provided that forwarding an item for collection to the drawee "shall be deemed due diligence" on the part of the forwarding bank. Both defendant and his bank had some knowledge of the drawee's unsound condition. The lower court gave judgment for the plaintiff. *Held*, on appeal, that the judgment be affirmed since (1) neither the defendant in depositing

the item, nor his bank in forwarding it to the drawee, exercised due diligence and (2) no sufficient notice of dishonor was given the plaintiff. *Blackwelder v. Fergus Motor Co.*, 260 Pac. 734 (Mont. 1927).

In the absence of statute or a special agreement it is generally held to be negligence *per se* for a collecting agent to send a check to the drawee bank for payment, since a drawee bank in financial difficulties might delay payment. *Maronde v. Vokenweider*, 279 S. W. 774 (Mo. 1926); 2 Paton, *Digest* (1926) § 1483a. And this is so where the drawee bank is the only one in the locality. *Winchester Milling Co. v. Bank of Winchester*, 120 Tenn. 225, 111 S. W. 248 (1907). But *cf. Spokane Valley Bank v. Lutes*, 133 Wash. 66, 233 Pac. 308 (1925); Brady, *Bank Checks* (2d ed. 1926) § 269. Many states, however, have statutes similar to that in the instant case sanctioning such action on the part of the collecting bank if it has used due diligence in other respects. 2 Paton, *loc. cit. supra.* Federal Reserve Banks, pursuant to regulation of the Reserve Board, stipulate for the privilege to do likewise. *Cf. Federal Reserve Bank v. Malloy*, 264 U. S. 160, 44 Sup. Ct. 296 (1924). It would seem that the purpose of these provisions is merely to give the collecting bank the privilege of handling collections in this manner without responsibility to the depositor. It has been held, however, under the statute that the adoption of a longer though usual method of collection would not constitute due presentment. *Federal Land Bank v. Barrow*, 189 N. C. 303, 127 S. E. 3 (1925). *Contra: Dudley v. Phenix-Girard Bank*, 114 So. 188 (Ala. 1927). In any event the instant holding that the statute does not operate to constitute a sending to the drawee bank a due presentment when the drawee is known to be in failing condition is to be approved. Probably also the forwarding bank could be held responsible to the depositor for negligence in such case. As the defendant delayed in giving notice the court's ruling that the drawer was discharged must also be sustained although the item was a check. Brannan, *Negotiable Instruments Law* (4th ed. 1926) 884. This phase of the situation, however, presents a serious risk to depositors. If the drawee is regarded as a collecting agent to present to itself and to protest and to give notice of dishonor, a failure in either regard would appear to discharge indorsers, notwithstanding the statute. Or if the sending is regarded as merely a presentment, the delay on the part of the sending bank before notice could be sent would again seem to work a discharge of secondary parties. This notwithstanding that in each case the forwarding bank might not be responsible to the depositor by reason of the collection statute. Both the "agency" and "presentment" views have been taken where other issues were involved. *Winchester Milling Co. v. Bank of Winchester, supra* (drawee of check described as agent); *Indig v. National City Bank*, 80 N. Y. 100 (1880) (sending of note to bank at which payable regarded as presentment).

BILLS AND NOTES—RESPONSIBILITY OF AGENT SIGNING WITHOUT AUTHORITY.—The plaintiff sued on a promissory note. The defendant, who had signed the instrument as agent, but without authority, contended that he was responsible only for breach of warranty of authority, and not on the instrument. From a denial of his motion to dismiss the suit, the defendant appealed. *Held*, that the judgment be affirmed, on the ground that the agent was responsible under § 20 of the N. I. L. *Georgia Nat'l Bank v. Lippmann*, 226 N. Y. Supp. 233 (1st Dept. 1928).

The original draft of § 20 of the N. I. L. reads: "Where a person adds to his signature words indicating that he signs for or in behalf of a principal or in a representative capacity, he is not liable on the instrument." This is the same as the English section, under which one signing as agent

but without authority is responsible only for breach of warranty. Crawford, *Negotiable Instruments Law* (1897) 26. Thus, the measure of damages would be only nominal if the "principal" was insolvent. But § 20 as adopted contains the further clause, "if he is duly authorized." This has been construed as making such signer responsible on the instrument if he was not authorized. *Pain v. Holtcamp*, 10 F. (2d) 443 (C. C. A. 8th, (1925); *Austin, Nichols and Co. v. Gross*, 98 Conn. 782, 120 Atl. 596 (1923); (1925) 9 MINN. L. REV. 666; (1923) 23 COL. L. REV. 392. Such construction has been said to be based upon a mere negative implication of § 20. (1906) 10 LAW NOTES (American) 104. But in view of the added clause, such interpretation would seem to be giving effect to the intention of the framers of the act. See 2 Williston, *Contracts* (1920) 2122. Yet the plain language of the first draft of this section indicates a purpose quite distinct from the instant problem, *i. e.*, to regard words of capacity as more than *descriptio personæ* and thereby to avoid holding the signer as a maker of the instrument. See Comment (1918) 27 YALE LAW JOURNAL 686; Brannan, *Negotiable Instruments Law* (4th ed. 1926) 164. Holding the signer responsible on the instrument imposes a stricter responsibility than is usual under agency or contract law. Mechem, *Agency* (3d ed. 1923) § 354; (1925) 35 YALE LAW JOURNAL 625; (1926) 26 COL. L. REV. 224. But it is submitted that this is desirable in its practical business aspect, as increasing transferability and resolving uncertainty as to the amount of the plaintiff's recovery. *Cf. Swift v. Tyson*, 16 Pet. 1, 20 (U. S. 1842); McKeehan, in Brannon, *op. cit. supra* at 163. But certainty and uniformity would probably be more readily obtained by amending the N. I. L. expressly to make one signing as agent, but unauthorized, responsible on the instrument.

CONTRACTS—ENFORCIBILITY OF CHARITABLE SUBSCRIPTIONS.—The deceased promised the plaintiff college $5000, due thirty days after her death, to be used as a fund to support a memorial scholarship bearing her name. The establishment of such scholarship was not mandatory under the college charter. Before her death she paid $1000 in advance which sum was set aside for the fund, and, soon after, she repudiated her promise. In an action against her executor to recover the unpaid balance, it was *held* (two judges *dissenting*) that the college, by accepting part payment toward the special memorial purpose, impliedly promised to do everything necessary on its part in relation to the fund and thereby created a bilateral contract. *Allegheny College v. National Bank*, 246 N. Y. 369, 159 N. E. 173 (1927).

The New York courts have not been friendly to charitable subscriptions and have upheld them in only a limited number of situations. *Wilson and Thompson v. Baptist Society*, 10 Barb. 308 (Sup. Ct. N. Y. 1851) (recovery denied, facts as in instant case but no advance payment); *Hull v. Pearson*, 38 App. Div. 588, 56 N. Y. Supp. 518 (2d Dept. 1899) (recovery denied though court might have found action in reliance); *Presbyterian Church v. Cooper*, 112 N. Y. 517; 20 N. E. 352 (1889) (same); see 48 L. R. A. (N. S.) 783, 784 (1914) annotation. The instant case would seem to go far toward reversing this attitude. In New York, and doubtless everywhere, the promise is enforced if it is expressed to be given in exchange for an act by the "charity," and the act is done. *Matter of Conger*, 113 Misc. 129, 184 N. Y. Supp. 74 (Surr. Ct. 1920); *cf. Lafayette Corp. v. Ryland*, 80 Wis. 29, 49 N. W. 157 (1891). Likewise, where the promisee has detrimentally changed its position in reliance upon the promise, though under no bargain. *Keuka College v. Ray*, 167 N. Y. 96, 60 N. E. 325 (1901); *cf. Eastern States League v. Vail's Estate*, 97 Vt. 495, 124 Atl. 568 (1924); (1924) 34 YALE LAW JOURNAL 99. Yet New York cases would indicate that where there has been no detriment, recovery could be had only on the facts of

the instant case, *i.e.*, where the purpose is special and memorial and part payment has been made. *Presbyterian Church v. Cooper, supra* (recovery denied, purpose merely general, no advance made); *Hull v. Pearson, supra* (recovery denied, purpose special, part payment made). Thus the New York courts have apparently made "memorial purpose" a criterion and uphold the promise only where the promisor has expressed a desire to have his memory embalmed. *Cf.* Wilmot, C. J., in *Attorney General v. Downing*, Wilm. 1, 33 (1767). New York now allows an ordinary donee-beneficiary to sue on a contract. *Seaver v. Ransom*, 224 N. Y. 233, 120 N. E. 639 (1918) (not a charitable subscripton). It has been suggested that a charity could recover on this ground. See Billig, *The Problem of Consideration in Charitable Subscriptions* (1927) 12 CORN. L. Q. 467, 475. And a few cases have been so decided. *Clark Memorial Ass'n v. Coleman's Estate*, 222 Mich. 599, 193 N. W. 219 (1923); see *Baptist Female University v. Borden*, 132 N. C. 476, 493, 44 S. E. 47, 53 (1903). Assuming the desirability of enforcing charitable subscriptions, this latter ground would seem unobjectionable and within the orthodox bargain theory of consideration where the promises are expressedly mutual. It is submitted that the policy in not upholding ordinary promises, based upon lack of consideration, has no application in charitable promises.

CORPORATIONS—SHARES CREATED IN VIOLATION OF "BLUE SKY" LAWS IN A HOLDER WITH KNOWLEDGE.—In an action by the plaintiff to collect salary alleged due, the defendant corporation filed a cross-complaint to recover payment for certain shares. The plaintiff knew that such shares had been created in violation of conditions set forth in a permit given by the Corporation Commissioner. The plaintiff also participated in shareholders' meetings, and never offered to surrender his share certificates until the date of the trial. From a judgment on the cross-complaint for the plaintiff, the defendant appeals. *Held*, that the judgment be affirmed, on the ground that a corporation acquires no right to payment for shares created in violation of the "Blue Sky" Law, nothwithstanding the shareholder's knowledge of the breach at the time of the original transaction. *Parrish v. Am. Ry. Employees' Pub. Corp.*, 256 Pac. 590 (Cal. 1927).

A shareholder without knowledge at the time of the original transaction may plead a violation of a "Blue Sky" Law, and defeat a claim by the corporation for the agreed return. *Dixie Rubber Co. v. McBee*, 148 Tenn. 168, 253 S. W. 353 (1923); *Witt v. Trustees' Loan and Savings Co.*, 33 Ga. App. 802, 127 S. E. 810 (1925); *Burlington Hotel Co. v. Bell*, 192 N. C. 620, 135 S. E. 616 (1926). *Contra: Sherman v. Smith*, 185 Iowa 654, 169 N. W. 216 (1918); *Watters & Martin Inc. v. Homes Corp.*, 136 Va. 114, 116 S. E. 366 (1923); *Warren People's Market Co. v. Corbett & Sons*, 114 Ohio St. 126, 151 N. E. 51 (1926). Courts are not likely, moreover, to construe any ordinary act of the holder as a waiver of this defense. *Farm Products Co. of Mich. v. Jordan*, 229 Mich. 235, 201 N. W. 198 (1924) (acceptance of dividends); *cf. Reno v. Am. Ice Machine Co.*, 72 Cal. App. 409, 237 Pac. 784 (1925) (participation in shareholders' meeting); but *see Winfred Farmers' Co. v. Smith*, 47 S. D. 498, 199 N. W. 477 (1924) (exercise of shareholdership for nine years). Such a defense would also prevail against corporate creditors. *Goodyear v. Meux*, 143 Tenn. 287, 228 S. W. 57 (1921). But see *Hancock v. Frederick Co-op. Mercantile Co.*, 48 S. D. 1, 3, 201 N. W. 714, 715 (1925). But not if the requirements of the statute are subsequently satisfied. *Moore v. Moffatt*, 188 Cal. 1, 204 Pac. 220 (1922). Under such circumstances, the holder may also be held to a double statutory responsibility to corporate creditors. *Parker v. Merritt*, 164 Minn. 305, 204 N. W. 941 (1925); *Hancock v. Frederick Co-op.*

Mercantile Co., supra. But not if the provisions of the "Blue Sky" Law have never been complied with. *Honn v. Hamer*, 253 Pac. 336 (Cal. 1927). Yet the claim for restoration for the amount paid by such a holder is deferred in the event of bankruptcy proceedings until after the satisfaction of the claims of general corporate creditors. *In re Racine Auto Tire Co.*, 290 Fed. 939 (C. C. A. 7th, 1923). But recovery will be allowed against a solvent corporation for the amount paid. *Otten v. Riesener Chocolate Co.*, 254 Pac. 942 (Cal. 1927); *Edward v. Ioor*, 205 Mich. 617, 172 N. W. 620 (1919); *Guaranty Mortgage Co. v. Wilcox*, 62 Utah 184, 218 Pac. 133 (1923) (recovery allowed on a counterclaim). And even though the corporation subsequently complied with the provisions of the statute. *Reno v. Am. Ice Mach. Co., supra; cf. Boss v. Silent Drama Syndicate*, 255 Pac. 225 (Cal. 1927). And notwithstanding the fact the holder participated in corporate affairs after knowledge of the violation. *Reno v. Am. Ice Machine Co., supra.* But if the recipient knew at the time of the original transaction that the "Blue Sky" Law was being violated, no recovery will be allowed. *Domenigoni v. Imperial Live Stock and Mortgage Co.*, 189 Cal. 467, 209 Pac. 36 (1922). To prevent circumvention of the "Blue Sky" Law, such a result would seem desirable. Conversely, by denying redress to the corporation against a holder with knowledge, the instant court has wisely provided another deterrent to breaches of the "Blue Sky" Law.

CRIMINAL LAW—FEDERAL PROBATION ACT—PROBATION AFTER EXECUTION OF SENTENCE COMMENCED.—The defendant was sentenced to three months imprisonment for violation of the National Prohibition Act, and commenced serving his term. The day following the sentence, the District Court entered an order placing him on probation. The United States took the case to the Circuit Court of Appeals by writ of error which certified to the Supreme Court the question whether under the Federal Probation Act [43 Stat. 1259, (1925) U. S. Comp. Stat. (Supp. 1925) § 10564 4/5] the district court had authority to place the defendant on probation after he had commenced serving his term. *Held*, that the order be reversed on the ground that the court had no such power. *United States v. Murray*, 48 Sup. Ct. 146 (1928).

It has been held that the Federal Probation Act, *supra*, can be applied after beginning of service of sentence. *United States v. Chafina*, 14 F. (2d) 622 (D. Ariz. 1926); see *United States v. Nix*, 8 F. (2d) 759, 762 (S. D. Cal. 1925). But see *Nix v. James*, 7 F. (2d) 590, 594 (C. C. A. 9th, 1925). This has been approved on the ground that the Federal Parole Act [36 Stat. 819, (1910) U. S. Comp. Stat. (1916) § 10535] does not afford relief in all cases since, under that act, a prisoner may be paroled only after serving one third of his sentence. (1927) 36 YALE LAW JOURNAL 420. But most of the lower federal courts have held to the contrary. *Davis v. United States*, 15 F. (2d) 697 (D. C. 1926); *Mouse v. United States*, 14 F. (2d) 202 (D. Kan. 1926); *United States v. Young* 17 F. (2d) 129 (N. D. Cal. 1927). The interference by a judge with a closed sentence, after the prisoner has been incarcerated, has been said to be very close to the exercise of the pardoning power, lodged in the executive and not in the court. See *Davis v. United States, supra* at 699. On the one hand the shame and stigma of imprisonment which the Probation Act in proper cases seeks to avoid will probably have already been accomplished. See *Archer v. Snook*, 10 F (2d) 567, 568 (N. D. Ga. 1926). But on the other hand probation also aims at the accomplishment of other purposes. (1927) 36 YALE LAW JOURNAL 420. It might be desirable not to burden the courts with petitions for which the Parole board was created. Criticism might well be directed to the Parole Act, which requires one third of the prisoner's sen-

tence to be served before the Parole Board can act, since this requirement is based upon two questionable assumptions, *viz*, that the purpose of imprisonment is punitive and that it is possible to determine from an individual under confinement, whether he will be a decent citizen on release, completely overlooking the fact that the most important stimulus to good behavior in prison, is the hope of an early release. Sutherland, *Criminology* (1924) 545.

CRIMINAL LAW—INDICTMENT—VARIANCE BETWEEN NAME ALLEGED AND PROVED.—The defendant was convicted of embezzlement and claimed, after the verdict, that there was a fatal variance between the indictment and the proof. The name of the prosecuting witness was McMurrain, but it was set forth in the indictment as "McMurray." *Held* that the variance was fatal and that the *idem sonans* rule was inapplicable. *May v. State*, 114 So. 788 (Ala. 1927).

In states which have no statutory provision for variance due to mistake in a party's name, the strict rule making the variance fatal seemingly applies. *Southern Express Co. v. State*, 23 Ga. App. 67, 97 S. E. 550 (1918) (allegation of name of defendant's agent, though not required must be proved as alleged); *People v. Novotney*, 305 Ill. 549, 137 N. E. 394 (1922) (prosecuting witness' name). The same states, however, find no fatal variance where the person is known by the name used in the indictment. *Jenkins v. State*, 4 Ga. App. 859, 62 S. E. 574 (1908) (where indictment includes name and alias, it is sufficient to prove either); *People v. Chrfrikas*, 295 Ill. 222, 129 N. E. 73 (1920); *Blockman v. State*, 115 So. 399 (Miss. 1928); *cf.* Complete Tex. Stat., Crim. Code (1920) § 456. Similarly, where the identity of the name in the indictment with the person produced on trial is established. *Chapman v. State*, 33 Ga. App. 570, 126 S. E. 895 (1925) (no claim made that C. Hodges and C. L. Hodge were different individuals). The question of variance can be avoided altogether by invoking the rule of *idem sonans*, which makes a variance in spelling immaterial where the ear can detect little difference, a rule obviously difficult of predictability. *Poldrack v. State*, 86 Tex. Cr. R. 272, 216 S. W. 170 (1919) (Matoska and Matosky); for good discussion see *People v. Gormach*, 302 Ill. 332, 134 N. E. 756 (1922); (1919) 17 MICH. L. REV. 705. Some courts find the variance immaterial where the defendant has notice of all facts necessary to his defense and is protected against future prosecution for the same offense. *Bennet v. United States*, 227 U. S. 333, 33 Sup. Ct. 288 (1912); *cf. Williams v. State*, 14 Okla. Cr. 100, 167 Pac. 763 (1917). One type of statute requires the defendant, when the variance concerns his name, to make the correction before entering the plea. Neb. Comp. Stat. (1922) § 10114. Another provides that errors as to names of any of the parties may be corrected at any time before judgment. Ark. Dig. Stat. (Crawford, 1921) §§ 3017–3018; *cf. Bridger v. State*, 122 Ark. 391, 183 S. W. 962 (1916); see also Okl. Comp. Stat. (1921) § 2557 (applying only to name of defendant). In Alabama, unless the defendant consents to amending the indictment, the prosecution must be dismissed with power in the court to order another indictment drawn. Ala. Code (1923) §§ 4550–4551. The obvious expense and delay involved where the variance is held fatal argues for a liberal allowance of amendments and corrected records. See (1928) 37 YALE LAW JOURNAL 383. Failure to object until after the verdict, it is submitted, should constitute a waiver. It has been so held where the mistake concerns the defendant's name. *Dunning v. State*, 108 So. 82 (Ala. 1926); *People v. Corbishley*, 327 Ill. 312, 158 N. E. 732 (1927). See also Neb. Comp. Stat. (1922) § 10113. But the same states held otherwise where the error concerned the name of the prosecuting witness. *Park v. State*,

106 So. 218 (Ala. 1925); *People v. Novotny, supra.* The holding of the instant case may thus be justified on the grounds of *stare decisis,* but the reason for the distinction is hidden.

DAMAGES—INSURANCE—"ACTUAL VALUE."—In an action to recover insurance for the loss of a malt factory, insured for the "actual cash value," but not in excess of the cost of repair or replacement, the trial court instructed the jury to consider only the cost of replacement minus the physical deterioration, although the building's utility and vendibility was greatly diminished by national prohibition. The judgment was affirmed by the Appellate Division. *Held,* on appeal, that the judgment be reversed since the cost of replacement minus depreciation did not measure the loss. *McAnarney v. Newark Fire Ins. Co.,* 247 N. Y. 176, 159 N. E. 902 (1928).

Where similar goods are freely obtainable, the insurer's responsibility is determined by the market value. *Gibson v. Glen Falls Ins. Co.,* 111 Neb. 827, 197 N. W. 950 (1924); *Goudie v. National Surety Co.,* 288 S. W. 369 (Mo. App. 1926). The problem of "actual cash value" becomes complex where there is no "market value" as that term is used with respect to staple commodities. The Supreme Court has indicated that the solution of this difficulty lies in the "present fair value" test, with cost-of-reproduction-minus-depreciation as the dominant element, not only in rate cases but for all property valuation. *Standard Oil Co. v. So. Pac. Co.,* 268 U. S. 146, 45 Sup. Ct. 465 (1925) (damages for destruction of ship). But *cf. People v. Burke,* 247 N. Y. 227, 160 N. E. 19 (1928) (valuation for issuance of securities not conclusive for valuation for taxation). In the ordinary insurance case, replacement cost minus depreciation is held a satisfactory substitute for market value. *Svea Fire & Life Ins. Co. v. State Savings & Loan Ass'n,* 19 F. (2d) 134 (C. C. A. 8th, 1927); *Boise Ass'n of Credit Men v. U. S. Fire Ins. Co.,* 256 Pac. 523 (Idaho, 1927). But *cf. Chicago Bonding & Ins. Co. v. Oliner,* 139 Md. 408, 115 Atl. 592. (1921) (original cost for liquor lost after prohibition act). Where, as in the instant case, there has been obsolescence, the reproduction cost minus physical depreciation is clearly not the equivalent of "actual value," whether from the point of view of objective "exchange value" or subjective "utility value." *Security Printing Co. v. Hartford Fire Ins. Co.,* 245 S. W. 1089 (Mo. App. 1922). If the courts were to include obsolescence in "depreciation," they would simply be making it a catch-all corrective for the discrepancy between cost of replacement and "value." In spite of the continuing indefiniteness of "actual value," the ruling in the instant case is so obviously desirable that it serves to illustrate the danger of giving the "present fair value" rule a fixed connotation of "cost of reproduction-minus-depreciation" if it is to be used as the test of "actual value" under all circumstances. Such a vague method of determining value, however, is a serious hindrance for rate making. *Cf.* Bonbright, *The Problem of Judicial Valuation,* 27 COL. L. REV. 493 (1927).

EVIDENCE—"DEAD MAN" STATUTE—IDENTIFICATION OF HANDWRITING.—The plaintiff brought an action as the payee of a promissory note against the executor of the maker. Over objection he was allowed to testify that he was familiar with the handwriting of the deceased, having seen him write his name during his lifetime. *Held,* on appeal, that the testimony was properly admitted since it was not barred by the statute prohibiting testimony by an interested party to transactions or communications with the deceased. *Jewett v. Budwick,* 260 Pac. 247 (Wash. 1927).

"Dead man" statutes have been severely criticized on the ground that they defeat honest claims of the living more often than they protect

estates of the dead. 1 Wigmore, *Evidence* (2d ed. 1923) § 578; Taft, *Comments on Will Contests in New York* (1921) 30 YALE LAW JOURNAL 593, 605; (1927) 36 *ibid.* 576, 1185. The majority of courts have held with the instant case that the identification of handwriting is not testimony concerning a transaction or communication, but merely an expression of opinion, which could not be controverted by the deceased if living, and hence is not barred by the statute. *Sankey v. Cook*, 82 Iowa 125, 47 N. W. 1077 (1891); *Johnson v. Bee*, 84 W. Va. 532, 100 S. E. 486 (1919); *Satterthwaite v. Davis*, 186 N. C. 565, 120 S. E. 221 (1923). This extends to the testimony of the personal representative of the deceased as well as to the adverse party. *Tucker v. Kellogg*, 8 Utah 11, 28 Pac. 870 (1892). But statements that the party has seen the deceased sign the instrument in question are excluded. *Bright v. Marcom*, 121 N. C. 86, 28 S. E. 60 (1897). And when the question was raised that the party had forged the deceased's signature, it was reversible error to allow him to testify that he had not, since this had the same probative force as a statement that deceased had signed. *Boyd v. Boyd*, 164 N. Y. 234, 58 N. E. 118 (1900). A few courts hold that since testimony to the genuineness of the signature tends ultimately to prove the entire transaction, it is inadmissible. *Oliver v. Oliver*, 313 Ill. 612, 145 N. E. 123 (1924); *Kirby v. Brooks*, 111 So. 235 (Ala. 1927). The rule of the instant case seems to accomplish by indirection a desirable result that might well be the basis of legislation.

EVIDENCE—PRIVILEGED COMMUNICATIONS—PHYSICIAN AND PATIENT—WAIVER OF PRIVILEGE.—In an action by the beneficiary of an accident policy the defendant tried to prove that the insured committed suicide and offered the testimony of three doctors to show certain statements made by the insured on the night of his injury. Section 11263 of the Iowa Code (1924) provides that: "No . . . physician . . . shall be allowed . . . to disclose any confidential communication intrusted to him in his professional capacity. . . ." It also provides that the section will not apply where the patient "waives the rights conferred." In excluding the evidence the lower court held that there was no waiver by the patient as a result of the following clause in the application: ". . . do you consent that any physician and surgeon who has been consulted by you may be examined touching any knowledge he may have acquired by reason of his relation to you, and give information in regard thereto. . . . A. Yes." *Held*, on appeal, that the judgment be affirmed. *Pride v. Interstate Business Men's Ass'n*, 216 N. W. 62 (Iowa, 1927).

No waiver of the patient's power to object can be implied from the fact that an insurance policy requires proofs of death. *Maine v. Maryland Cas. Co.*, 172 Wis. 350, 178 N. W. 749 (1920). But see 5 Wigmore, *Evidence* (2d ed. 1923) § 2388. *Cf. Western T. Acc. Ass'n v. Munson*, 73 Neb. 858, 103 N. W. 688 (1905). But where there is a clause in the application similar to the one in the instant case there is a waiver of the power with regard to communications made at the time of or prior to the signing of the application. *Adreveno v. Mutual R. L. Ass'n*, 34 Fed. 870 (C. C. Mo. 1888); *Modern Woodmen v. Angle*, 127 Mo. App. 94, 104 S. W. 297 (1907); *Bryant v. Modern Woodmen*, 86 Neb. 372, 125 N. W. 621 (1910); *Metropolitan L. Ins. Co. v. Willis*, 37 Ind. App. 48, 76 N. E. 560 (1906) (communications made after signing of application but before delivery of policy). *Contra:* N. Y. Civ. Prac. Act (1927) § 354; *Holden v. Metropolitan L. Ins. Co.*, 165 N. Y. 13, 58 N. E. 771 (1900); *Gilchrist v. Mystic Workers*, 188 Mich. 466, 154 N. W. 575 (1915). Similarly, evidence of communications made before or after signing of the application is admissible where the clause provides for disclosure by a physician who has "heretofore attended

or may hereafter attend." *Metropolitan L. Ins. Co. v. Brubaker*, 78 Kan. 146, 96 Pac. 62 (1908); *Fuller v. Knights of Pythias*, 129 N. C. 318, 40 S. E. 65 (1901); *New York L. Ins. Co. v. Snyder*, 158 N. E. 176 (Ohio, 1927). Likewise, evidence of future communications has been held admissible where the clause waived the provisions of the statute that disqualified "any physician from testifying concerning any information obtained by him in a professional capacity." *Trull v. Modern Woodmen*, 12 Idaho 318, 85 Pac. 1081 (1906); *Sovereign Camp v. Farmer*, 116 Miss. 626, 77 So. 655 (1917). In line wth these cases it might reasonably have been held that the clause in the instant case was a waiver of the power as to future communications. It is quite likely that the clause was intended to have such a construction. Most courts apparently have decided the question without considering the exact wording of the clause or the time when the communications were made. *Adreveno v. Mutual R. L. Ass'n, supra; Keller v. Home L. Ins. Co.*, 95 Mo. App. 627, 69 S. W. 612 (1902); *Trull v. Modern Woodmen, supra; Sovereign Camp v. Farmer, supra; New York L. Ins. Co. v. Snyder, supra.* Such clauses have been held contrary to public policy. *Gilchrist v. Mystic Workers, supra; cf. Geare v. U. S. Life Ins. Co.*, 66 Minn. 91, 68 N. W. 731 (1896). Most cases are contra, however, on the ground that insurance companies would otherwise be defrauded by suicides. See *New York Life Ins. Co. v. Snyder, supra*, at 179.

INTEREST—NON-USURIOUS AGREEMENT TO PAY RATE HIGHER THAN LEGAL RATE AFTER MATURITY IS ENFORCEABLE.—The plaintiff sued to recover the principal and interest of certain mortgage notes executed by the defendant. The notes provided for an interest rate of 6% before and 12% after maturity. A statute provided: "Interest at the rate of six per centum a year and no more, may be recovered and allowed in civil actions, including actions to recover money loaned at a greater rate, as damages for the detention of money after it becomes payable. . . ." Conn. Gen. Stat. (1918) § 4797. In a foreclosure suit, only 6% interest after maturity was allowed. *Held*, on appeal, that 12% could be recovered. *Globe Investment Co. v. Barta*, 140 Atl. 202 (Conn. 1928).

Contracts silent as to interest bear the legal rate from default. *Bast v. Sproll*, 176 Wis. 371, 187 N. W. 223 (1922); *Knight v. Barnwell*, 130 Atl. 736 (N. J. 1925) (from maturity on time notes); *Van Vliet v. Kanter*, 139 App. Div. 603, 124 N. Y. Supp. 63 (1st Dept. 1910) (from demand, or from bringing of action on demand notes); 3 Williston, *Contracts* (1920) § 1410; 2 Paton's *Digest* (1926) § 2886a. Likewise the legal rate obtains both before and after maturity where there is a provision to pay interest but no rate is mentioned. *Lines v. Potter*, 42 S. D. 463, 176 N. W. 150 (1920). The legal rate also usually governs after maturity where the contract provides for a rate other than the legal rate before maturity but makes no provision for a rate after maturity. *Pryor v. City of Buffalo*, 197 N. Y. 123, 90 N. E. 423 (1909); *Eaton v. Boissonnault*, 67 Me. 540 (1877). *Contra: People v. Getzendaner*, 137 Ill. 234, 34 N. E. 297 (1891) (contract rate governs). However, if the rate is qualified by the words, "until paid," or similar expressions, most courts hold that the rate continues after maturity. *Smythe v. Inhabitants of New Providence*, 263 Fed. 481 (C. C. A. 3d, 1920); *Augusta Bank v. Hewins*, 90 Me. 255, 38 Atl. 156 (1897). Kansas has codified this rule. Kan. Gen. Stat. (1909) § 4348. *Contra: Kaufmann v. Kaufmann*, 239 Pa. 42, 86 Atl. 634 (1913). Where interest is charged at a certain rate until maturity, a provision for a non-usurious rate higher than the legal rate to apply retroactively after maturity for the entire period is enforceable as applying only from maturity. *Robbins v. Maddy*, 95 Kan. 219, 147 Pac. 826 (1915); *Scottish-Amer. Mort-*

gage Co. v. Wilson, 24 Fed. 310 (C. C. Kan. 1885). But a few courts enforce the agreement literally. *Finger v. McCaughey*, 114 Cal. 64, 45 Pac. 1004 (1896). Where this higher rate is expressly agreed to be operative only after maturity, it is generally enforceable. *Union Estates Co. v. Adlon Construction Co.*, 221 N. Y. 183, 116 N. E. 984 (1917); 12 A. L. R. 363, 367 (1921) annotation; *De Cordova v. Weeks*, 246 Mass. 100, 140 N. E. 269 (1923) (rate must not be so high as to "shock the conscience of the court"). *Contra: Chase v. Whitten*, 62 Minn. 498, 65 N. W. 84 (1895). The higher rate of interest after maturity so stipulated for has been held to be without the purview of a statute, similar to the one in the instant case. *Hubbard v. Callahan*, 42 Conn. 524 (1875). It is not an unusual business practice to allow the borrower some time after the maturity of his mortgage note to meet his obligations. A broad application of the Connecticut statute would probably result in increased pressure to force prompt payment. Whether this would result in increased litigation, an undesirable result, or greater promptness in paying, a desirable result, cannot be answered abstractly. Conceivably, the undesirable aspect of the case would obtain, coupled with a practice of demanding increased bonuses or higher rates before maturity. In the absence of an express interdiction, the Connecticut statute should be confined to cases where there is no stipulation by the parties. *Cf.* Conn. Gen. Stat. (1918) § 4795; Minn. Gen. Stat. (1923) § 7036. The same applies to a demand note bearing a non-usurious rate of interest higher than the legal rate.

LIENS—FILING—CONFORMITY REQUIREMENT—EFFECT OF STATE STATUTES ON FEDERAL COURT JUDGMENTS.—A Missouri statute provided that the judgments of the lower state courts of record should constitute liens upon rendition, but that judgments of the state appellate courts and federal courts should be liens only when transcripts thereof were filed with the clerk of a proper state circuit court. Mo. Rev. Stat. (1919) §§ 1554, 1555, 1556. The Act of 1888 provides that transcripts may be required by state statutes to make a federal court judgment a lien, provided the same requirements are prescribed for state courts. 25 Stat. 357, (1888) U. S. Comp. Stat. (1916) § 1606. The plaintiff purchased land at an execution sale on a judgment rendered in the federal district court in Missouri. The defendant claimed as a purchaser of the same land from the original owner subsequent to the rendition of the judgment, of which no transcript had been filed, but prior to the execution sale. The Missouri Supreme Court gave judgment for the defendant. On certiorari *held*, that the judgment be reversed, since the Missouri statute was in conflict with the Act of 1888, the requirement that a transcript be filed not applying to all state courts. *Rhea v. Smith*, 274 U. S. 434, 47 Sup. Ct. 698 (1927).

The Act of 1888, by authorizing states to require the filing of transcripts of federal court judgments, made it unnecessary to search the records of federal courts as well as those of the office of the county clerk to ascertain the judgment liens on property within that county. See *Dartmouth Savings Bank v. Bates*, 44 Fed. 546 (C. C. Kan. 1890). The statute must in fact result in exact conformity in all material particulars between state and federal court judgments. *Lineker v. Dillon*, 275 Fed. 460 (N. D. Cal. 1921); *In re Jackson Light and Traction Co.*, 269 Fed. 223 (C. C. A. 5th, 1920); see Note (1928) 13 IOWA L. REV. 203. Where the statute does not seem to require conformity, but in fact results in requiring the necessary conformity, it is no doubt valid. See Iowa Code (1927) §§ 11603, 11604. The decision in the instant case has been forecast. See (1926) 35 YALE LAW JOURNAL 637. This decision makes the validity of certain existing enactments look dubious. *Cf. Land Co. v. Husted*, 263 Pa. 342, 106 Atl.

540 (1919); see also Ohio Gen. Code (1926) §§ 2889–2890. States whose judgments are in fact liens upon rendition only cannot take advantage of the Act of 1888. See White, *"Re-Rhea v. Smith"* (1927) 6 TITLE NEWS, no. 10, p. 8.

MASTER AND SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—ASSUMPTION OF RISK.—The plaintiff, a longshoreman, helping to load a ship, found spots of grease on the passageway he had to use. He notified the gangway-man, who said that he would tell the boss. The plaintiff continued to work, and after an hour, slipped and broke his leg. In a suit for the injury he recovered judgment. *Held*, on appeal, that the judgment be reversed on the ground that the plaintiff had assumed the risk and could not recover under the Federal Employers' Liability Act. 35 Stat. 65 (1908) 45 U. S. C. A. § 51–59 as extended by 41 Stat. 1007 (1920) 46 U. S. C. A. § 688. *Yaconi v. Brady & Gioe*, 246 N. Y. 300, 158 N. E. 876 (1927).

The Federal Employers' Liability Act was passed in response to a public demand that the harshness of the common law towards the employee be modified, a demand which had previously led to the passage of the Federal Safety Appliance Acts [27 Stat. 531, 32 Stat. 943]. Peterson, *The Joker in the Federal Employers' Liability Act* (1915) 80 CENT. L. J. 5. By abolishing the defenses of the fellow servant rule and contributory negligence it was, at the time, a liberal innovation in this country. But it retained the defense of assumption of risk. *Seaboard Air Line v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635 (1914). However, to help enforce the Safety Appliance and kindred statutes, it is held that this defense is of no avail if the employer has failed to comply with such federal statutory requirements. *So. Ry. v. Crockett*, 234 U. S. 725, 34 Sup. Ct. 897 (1914). The retention of this defense has subjected the act to criticism, particularly in view of the subsequent state workmen's compensation laws which abolish the defense of assumption of risk entirely. Note (1918) 3 MINN. L. REV. 57; Buford, *Assumption of Risk Under the Federal Employers' Liability Act* (1914) 28 HARV. L. REV. 163. It seems particularly harsh to those whose occupations bring them within the federal act, for an employee coming under it is barred from relief under a state statute. *New York Central v. Winfield*, 244 U. S. 147, 37 Sup. Ct. 546 (1917); Note (1917) 2 MINN. L. REV. 49; Note (1927) 22 ILL. L. REV. 209. As a result, the federal act, once inviting because of its liberalism, is now avoided wherever possible as reactionary, and "interstate commerce" has been subjected to strained interpretations to effect desirable results. Comment (1921) 9 CALIF. L. REV. 260. By abolishing the defense of contributory negligence (leaving it to be "considered" in the mitigation of damages) the courts are constrained to distinguish between "contributory negligence" and "assumption of risk." *Seaboard Air Line v. Horton*, 239 U. S. 595, 36 Sup. Ct. 180 (1916). In the first case on this point, the Supreme Court predicated such a distinction upon the supposed "contractual" nature of assumption of risk as opposed to the "tortious" nature of contributory negligence. *Seaboard Air Line v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635 (1914). But subsequent cases have left the question in great confusion. *Cf. Jacobs v. Southern Ry.*, 241 U. S. 229, 36 Sup. Ct. 588 (1916); *Cincinnati N. O. & T. P. Ry. v. Thompson*, 236 Fed. 1 (C. C. A. 6th, 1916); *McAdoo v. Anzellotti*, 271 Fed. 268 (C. C. A. 2d, 1921). See *Voorhees v. Central R. R. of N. J.*, 14 F. (2d) 899 (C. C. A. 3rd, 1926); *Hartwick v. Chicago & A. R. R.*, 286 Fed. 672 (C. C. A. 7th, 1922). In view of the plaintiff's necessity of suing under the federal act and of the tenuous character of the distinction drawn between "contributory negligence" and "assumption of risk," the present result would seem unfortunate and unnecessary as "assumption of risk" ordinarily includes

only such risks as are *normally* incident to an occupation. Under cases such as those cited *supra*, it would appear that the more carelessly the plaintiff had acted, the greater the likelihood would have been of his acts being construed as "contributory negligence," and hence no defense to the defendant. Since the institution of the present suit, a new federal statute abolishes all three common law defenses as to longshoremen and harbor workers. 44 Stat. 1424 (Act Mar. 4, 1927); (1926) 16 AM. LABOR LEG. REV. 127; see Note (1927) 36 YALE LAW JOURNAL 414. However, the large class of interstate railway employees are still protected only by the inadequate Federal Employers Act of 1908. An extension of the new act to them would seem highly desirable.

REAL PROPERTY—COVENANT—ENJOINING BREACH THEREOF.—The grantors of the defendant covenanted with the predecessors of the plaintiff that only a single family house should be erected. In a suit to enjoin the defendant from continuing to build a three family house it was *held* that a mandatory injunction would not be granted since, *inter alia*, the violation of the covenant was the result of mistake and the defendant had incurred much expense before suit was brought. *Bauby v. Krasow*, 139 Atl. 508 (Conn. 1927).

Courts have denied relief in like situations where the defendant has had notice of a restrictive covenant. *Forstmann v. Joray Co.*, 224 N. Y. 22, 154 N. E. 652 (1926) (damage to defendant would not inure to plaintiff's benefit); *Forsee v. Jackson*, 192 Mo. App. 408, 182 S. W. 783 (1916) (injunction deemed too drastic); *Downs v. Kroeger*, 254 Pac. 1101 (Cal. 1927) (change of neighborhood); *Straus v. Loudenslager*, 96 N. J. Eq. 678, 127 Atl. 22 (1924) (violation held too slight); *Lynch v. Union Institute*, 159 Mass. 306, 34 N. E. 364 (1893) (duration of covenant only 18 months). But courts have generally issued mandatory injunctions when the defendant was guilty of a wilful breach. *Nechman v. Supplee*, 236 Mich. 116, 210 N. W. 323 (1926); *Stewart v. Finkelstone*, 206 Mass. 28, 92 N. E. 37 (1910). Such courts stress the fact that it is the defendant's own agreement that is being enforced. *Spilling v. Hutcheson*, 111 Va. 179, 68 S. E. 250 (1910); *Cheatham v. Taylor*, 138 S. E. 545 (Va. 1927). And the fact alone that expense is caused the defendant in enforcing the covenant will not be sufficient to deny injunctive relief. *Johnson v. Robertson*, 156 Iowa 64, 135 N. W. 585 (1912); *Lavan v. Menaker*, 280 Pa. 591, 124 Atl. 733 (1924). On the other hand, like covenants have not been specifically enforced when the plaintiff's conduct has not met the approval of the court. *Gage v. Schavoir*, 124 Atl. 535 (Conn. 1924) (plaintiff guilty of laches); *Union Trust Co. v. Best*, 160 Cal. 263, 116 Pac. 737 (1911) (waiver of the covenant). Since the factors that determine the disposition of each case are subject to much discretion, *viz*, laches of the plaintiff, state of mind of the defendant, status of the neighborhood and adequacy of damages, it is a consideration of the relative monetary values involved on behalf of the plaintiff and defendant that will generally determine the issue. Such consideration would appear to have moved the instant court to deny the injunction. But the query remains whether one should be able to circumvent legal obligations by "intrenchment behind considerable expenditure." *Stewart v. Finkelstone, supra.*

RECEIVERS—FEDERAL AND STATE COURTS—CONFLICT OF JURISDICTION.—A minority shareholder filed a bill in the state court, asking for the appointment of a receiver to carry on the business of the corporation. The attorney for the corporation obtained a postponement of the hearing for a week by agreeing that nothing would be done to disturb the *status quo*. Imme-

diately thereafter he procured a non-resident creditor of the corporation to file a bill in the federal district court, asking for the appointment of a receiver to wind up the affairs of the corporation. The district court appointed the appellees the following day. Later, the state court appointed the appellant's receivers. They requested the district court to order the transfer of the property to them. Both the district court and the United States Circuit Court of Appeals refused to issue the order. On certiorari the Supreme Court *held* that the property should be surrendered upon the condition that the appellants produce an order from the state court affirming all that had been done in regard to the property and allowing the bill to proceed as a creditor's bill in view of the insolvency of the corporation. *Harkin v. Brundage*, 48 Sup. Ct. 268 (U. S. 1923).

Where a federal and state court both can take jurisdiction of a suit, the tribunal whose jurisdiction first attaches retains exclusive jurisdiction and control of the property involved. *Farmers' Loan and Trust Co. v. Lake Street Elevated R. R.*, 177 U. S. 51, 20 Sup. Ct. 564 (1900); 1 Foster, *Federal Practice* (6th ed. 1920) 190; see Note (1927) 41 HARV. L. REV. 70. The difficult question is as to when jurisdiction attaches. Where the issues, subject matter and relief sought in the two courts are practically identical, the court in which the bill is filed and from which process issues first obtains jurisdiction without obtaining either actual or constructive possession of the property. *Farmers' Loan and Trust Co. v. Lake Street El. R. R., supra; Ward v. Foulkrod*, 264 Fed. 627 (C. C. A. 3d, 1920); see *Kline v. Burke Construction Co.*, 260 U. S. 226, 229, 43 Sup. Ct. 79, 82 (1922). If the two proceedings are not substantially identical, but control of the same property is involved in each, the court which first obtains actual or constructive possession of the property by appointing a receiver obtains exclusive control over the property even though the suit in the other court is pending. *Knudsen v. First Trust and Savings Bank*, 245 Fed. 81 (C. C. A. 9th, 1917). The Circuit Court of Appeals decided the instant case on the ground that the two bills were not similar in purpose and that the federal court obtained exclusive jurisdiction over the property by appointing the receivers. *Harkin v. Brundage*, 13 F. (2d) 617 (C. C. A. 7th, 1926). The Supreme Court accepted this as the correct view on the face of the pleadings, but held that the federal courts should refuse to take advantage of the fraud practiced upon the state court. The decision should be commended as tending to prevent conflict between the two systems and as tending to discourage collusive proceedings of this kind. The condition imposed upon the state court receivers was necessitated by the fact that rights of innocent creditors had become involved.

TAXATION—TRANSFER TAX ON TRUST FUND WHERE BENEFICIARIES DO NOT RECEIVE INCOME UNTIL SETTLOR'S DEATH.—*M* conveyed certain shares in the capital stock of *X* Company to *T* in trust on the following terms: *M* reserved the power to draw from the fund, in any year in which her personal income from other sources was less than a specified amount, to the extent of that difference. *T* was directed to pay such sums to charities as *M* should specify, out of the net income, the residue of which was to be added to the principal. After *M's* death one third of the income was to be paid to each of her children; provided, however, that if all the children predeceased *M*, the trust should terminate. *M* reserved the power to revoke the trust with the consent of any one child, and also the power to vote the shares of stock. At *M's* death a transfer tax was imposed on the trust estate. *Held*, on appeal, that since the transfer was "intended to take effect in possession or enjoyment" after the settlor's death, the tax was properly

assessed under Ill. Rev. Stat. (1927) c. 120, § 396. *People v. McCormick*, 158 N. E. 861 (Ill. 1927).

The statutes of several states impose a tax on transfers "intended to take effect in possession or enjoyment" at or after the trustor's death. 40 Stat. 1097 (U. S. 1919); Mass. Gen. Laws (1921) c. 65, § 1; N. Y. Cons. Laws (1909) c. 61, § 220, par. 4. The mere fact that a trust is revocable or its beneficiaries subject to be changed by the settlor does not render it taxable under such a statute. *People v. Northern Trust Co.*, 289 Ill. 475, 124 N. E. 662 (1919); *Dexter v. Treas. & Rec'r Gen.*, 243 Mass. 523, 137 N. E. 877 (1923); see Comment (1926) 35 YALE LAW JOURNAL 601. Nor does the added fact that the trustor retains the power to vote the shares of stock comprising the trust fund suffice to bring the transfer within the provision. *Matter of Kountze*, 120 Misc. 289, 198 N. Y. Supp. 442 (Surr. Ct., 1923). It has been contended that where the trust is complete and valid, and the interests thereby created become vested at the time of its creation, the trust is not subject to the tax. Stimson, *Taxation of Revocable Trusts* (1927) 25 MICH. L. REV. 839. But it seems to be generally held that such a trust is taxable at the donor's death where he has reserved to himself the income for life. *Saltonstall v. Treas. & Rec'r Gen.*, 256 Mass. 519, 153 N. E. 4 (1926); *People v. Welch's Estate*, 235 Mich. 555, 209 N. W. 930 (1926) (amount of trust estate necessary to produce annuity reserved to donor is taxable); (1922) 31 YALE LAW JOURNAL 671. The suggestion has also been made that the statutory clause under consideration will be construed as referring to the time when the beneficiary's interest has become technically vested where no attempt at tax evasion appears. Note (1925) 74 U. PA. L. REV. 176. But the cases do not seem to support this proposition. *McCaughn v. Girard Trust Co.*, 11 F. (2d) 520 (C. C. A. 3d, 1926); *Moore v. Bugbee*, 128 Atl. 679 (N. J. 1925), *aff'd* 135 Atl. 919 (N. J. 1926). So that a transfer is not deemed to take effect in possession or enjoyment until the beneficiary actually receives the beneficial interest. *Pratt v. Dean*, 246 Mass. 300, 140 N. E. 924 (1923); *Bank & Trust Co. v. Doughton*, 188 N. C. 762, 125 S. E. 621 (1924). This is very probably in accord with the legislative intent. In the instant case the transfer is clearly taxable since the beneficiaries had neither a vested nor a beneficial interest until the settlor's death.

TORTS—ACTION BY WIFE AGAINST HUSBAND FOR PERSONAL TORT.—The plaintiff sued her husband for malicious prosecution under the Domestic Relations Law, § 57 [N. Y. Cons. Laws (Cahill, 1923) c. 14, § 57] which gives a married woman a right of action for injury to her person, as if unmarried. The complaint was dismissed in Special Term on the ground that such an action will not lie between husband and wife. This order was affirmed without opinion by the Appellate Division. *Held*, on appeal, (two judges *dissenting*) that the judgment be affirmed, since the later acts of the legislature have not altered the rule adopted in *Schultz v. Schultz*, 89 N. Y. 644 (1882). *Allen v. Allen*, 159 N. E. 656 (N. Y. 1927).

The sharp conflict as to whether a wife may sue a husband in a civil action for wrong to her person under the Married Women Acts has continued in spite of many predictions that the liberal rule allowing such actions was gradually gaining headway. See Comment (1923) 33 YALE LAW JOURNAL 315, 317, n. 9. There are far more recent decisions refusing such suits than allowing them. *Clark v. Clark*, 11 F. (2d) 871 (S. D. N. Y. 1925), *aff'd* 11 F. (2d) 871 (C. C. A. 2d, 1926); *Harvey v. Harvey*, 239 Mich. 142, 214 N. W. 305 (1927); *Riser v. Riser*, 240 Mich. 402, 215 N. W. 290 (1927); *Emerson v. Western Seed & Irrigation Co.*, 216 N. W. 297 (Neb. 1927); *Austin v. Austin*, 136 Miss. 61, 100 So. 591 (1924); *In re*

Dolmage's Estate, 212 N. W. 553 (Iowa, 1927). An action for wilful injuries has been allowed. *Crowell v. Crowell*, 180 N. C. 516, 105 S. E. 206 (1920). And some states have granted recovery for negligent injuries. *Wait v. Pierce*, 191 Wis. 202, 209 N. W. 475 (1926); *Bushnell v. Bushnell*, 103 Conn. 583, 131 Atl. 432 (1925); *Roberts v. Roberts*, 185 N. C. 566, 118 S. E. 9 (1923). Some of the Married Women Statutes provide for recovery for injuries caused by the wrongful act of any person [Iowa Code (1927) § 10462], or expressly enable a husband and wife to sue each other. Miss. Ann. Code (Hemingway, 1927) §§ 2185, 2186. Nevertheless Iowa has interpreted the statute as merely granting greater damages in actions against third parties and no action against a spouse. See *In re Dolmage's Estate, supra*, at 554. While Mississippi nullified the statute by interpreting it to mean that the right to sue is acquired only if a "cause of action" previously existed. *Austin v. Austin*, supra. Another type of statute merely enables a married woman to acquire and deal with all property as if unmarried. Mich. Comp. Laws (1915) § 11485; *cf.* N. C. Cons. Stat. (1919) §§ 408, 454, 2506; Neb. Comp. Stat. (1922) §§ 1509–1511; N. Y. Cons. Laws (Cahill, 1923) c. 14, § 57; Conn. Gen. Stat. (1918) § 5274. But under these statutes diametrically opposite results have nevertheless been reached on the instant question. *Cf.* instant case and *Crowell v. Crowell, supra*. It seems therefore, that little can be predicated on the wording of the statute. The position of the instant court in relying upon an unbroken line of precedent even though confronted by a very strong set of facts is understandable. Nevertheless, efforts, such as are found in the dissenting opinion, to repudiate the fictional unity of husband and wife as a basis of decision are commendable. An insurance company is often the real party defendant in negligence cases. Denial of relief in such case may be justified because of the strong possibility of fraud against the company. But it obviously does not follow that relief should be denied in wilful injury cases.

TORTS—DEFAMATION—TRUTH AS A DEFENSE—"RIGHT OF PRIVACY."—The defendant posted a sign in the show window of his garage to the effect that the plaintiff owed him an account and that if promises would pay it, the bill would have been settled long ago. In an action for libel, truth was set up as a defense under a statute. *Held*, on appeal, that the judgment for the plaintiff below be affirmed, since this was not an action for libel, but one for the invasion of the plaintiff's "right of privacy." *Brents v. Morgan*, 299 S. W. 967 (Ky. 1927).

Although the rule is much voiced that truth is a complete defense to libel, courts which purport to follow it have avoided its application in situations similar to that of the instant case. Thus, placarding a debtor's house with a request to call and pay his debts has been held actionable. *Thompson v. Adelberg*, 181 Ky. 487, 205 S. W. 558 (1918). And a duty to pay damages was imposed on a defendant who attached to furniture on the sidewalk in front of his store the following legend: "Taken from [the plaintiff] who would not pay for it. Moral? Beware of dead beats." *Woodling v. Knickerbocker*, 31 Minn. 268, 17 N. W. 387 (1883). Likewise, a creditor has been held to be under a duty not to post large yellow signs advertising a debtor's accounts for sale. *Green v. Minnes*, 22 Ont. Rep. 77 (1891). In a case almost identical with the instant case, tort responsibility was imposed. *Davis v. Wetner*, City Ct. N. Y. (1889) (barber placed customer's shaving mug in window with the inscription: "This man owes me for shaving $1.15 since 1885). In none of the foregoing cases was the result labelled "right of privacy" in order to avoid the ordinary libel rule. And it is believed that in the past the "right of privacy" category has been confined to cases involving the use of a person's name or portrait for adver-

tising or trade purposes. See Comment (1928) 1 So. CALIF. L. REV. 293, 295. In some states, by statute, truth is only a complete defense to libel when published from justifiable motives. Under that rule damages were allowed for sending a letter to a debtor with the name of an organization for collecting bad debts on the envelope. *Missouri v. Armstrong*, 106 Mo. 395, 16 S. W. 604 (1891). And for publishing in a newspaper that the plaintiff refused to pay his debts. *Turner v. Brien*, 184 Iowa 320, 167 N. W. 584 (1918). Moreover, publication in a newspaper that the plaintiff had failed to pay overdue taxes was held actionable in the absence of such a statute as that mentioned above, the court broadly approving the rule that truth is not a complete defense when the publication is from unjustifiable motives. *Hutchins v. Page*, 75 N. H. 215, 72 Atl. 689 (1909); see *Burkhart v. No. American Co.*, 214 Pa. 39, 43, 63 Atl. 410, 411 (1906). It may be accurately predicted that courts will not permit resort to such obnoxious methods of collecting debts whether or not the libel rule in a given jurisdiction states truth to be an absolute defense. And it would seem to be rather obvious that the right created in the instant case was classified as a "right of privacy" in order to avoid any embarrassment which might arise from calling it a libel.

TRUSTS—WHEN IMPERFECT GIFT MAY BE DECLARATION OF TRUST.—An envelope containing bonds was found in the deceased's safe-deposit box with the words "all in envelope belong to Anna C. Miller" written thereon. Inside on a slip of paper signed by the deceased was written: "Whatever is in this envelope belongs to Miss Anna C. Miller." The evidence showed that the deceased had purchased these bonds. In an action by Anna C. Miller against the deceased's administratrix, the court, reversing a directed verdict of the trial court in favor of the plaintiff, *dismissed* the complaint, holding that the writing was an imperfect gift which equity would not perfect by converting into a declaration of trust. *Miller v. Silverman*, 224 N. Y. Supp. 609 (2d Dept. 1927).

The English Court of Chancery, after *Ex Parte Pye*, 18 Ves. 140 (1811), extended for a time the doctrine there expressed so as to enforce as declarations of trust gifts imperfectly executed. *Richardson v. Richardson*, L. R. 3 Eq. 686 (1867) (attempted assignment of notes ineffectual because of lack of endorsement); *Morgan v. Malleson*, L. R. 10 Eq. 475 (1870) (memorandum stating "I hereby give and make over to *M* an India bond" given to *M*, but bond itself never delivered). Later English decisions, however, do not enforce as a trust an imperfect gift unless there is a clear intent to establish a trust. *Richards v. Delbridge*, L. R. 18 Eq. 11 (1874) (memorandum made stating that a lease and stock in trade was given to E. but no actual delivery except that of the lease to donee's mother); *Heartley v. Nicholson*, L. R. 19 Eq. 233 (1875) (ineffectual written instrument). Except for the approval by way of dictum of the cases of *Richardson v. Richardson, supra*, and *Morgan v. Malleson, supra*, in *Helfenstein's Estate*, 77 Pa. St. 328, 331 (1875), the courts of this country have universally followed the later English view. *Young v. Young*, 80 N. Y. 422 (1880); *Beck v. Staudt*, 149 App. Div. 35, 133 N. Y. Supp. 529 (1st Dept. 1912), *aff'd* 208 N. Y. 566, 101 N. E. 1095 (1913); *Mitchell v. Weaver*, 242 Mass. 331, 136 N. E. 166 (1922); *Eschen v. Steers*, 10 F. (2d) 739 (C. C. A. 8th, 1926); Graves, *Gifts of Personalty* (1896) 1 VA. L. REG. 878; 3 Pomeroy, *Equity Jurisprudence* (4th ed. 1918) § 997. The difficulty arises in determining what acts or declarations will be construed as evidence of an intention to create a trust. The distinction in some cases is very slight. An intention to create a trust was not found in cases where certificates of stocks or bonds were placed in a safe-deposit box in an envelope bearing words in-

dicating that the enclosed belonged to plaintiff. *Young v. Young, supra; Gegan v. Union Trust Co.*, 129 App. Div. 184, 113 N. Y. Supp. 595 (1st Dept. 1908), *aff'd* 198 N. Y. 541, 92 N. E. 1085 (1910); *Beck v. Staudt, supra; Shea v. Crofut*, 203 App. Div. 210, 196 N. Y. Supp. 850 (2d Dept. 1922) (also evidence of oral declarations that plaintiff was to have the bonds). *Contra: Cahlan v. Bank of Lassen Co.*, 11 Cal. App. 533, 105 Pac. 765 (1909) (also evidence of oral statements that deceased had given certificates to plaintiff); *Knagenhjelm v. Rhode Island Hospital Trust Co.*, 43 R. I. 559, 114 Atl. 5 (1921) (writing stated that the stock was held in trust for plaintiff). Likewise there was not sufficient evidence of an intention to create a trust where money was deposited in a bank in the deceased's name and the deceased frequently stated it was plaintiff's. *Smithwick v. Bank of Corning*, 95 Ark. 463, 130 S. W. 166 (1910). *Contra: McCaffrey v. North Adams Saving Bank*, 244 Mass. 396, 138 N. E. 393 (1923) (deposit was made in deceased's name as trustee). Nor where there was an attempted assignment which failed because of lack of delivery. *Wald v. Hazelton*, 137 N. Y. 215, 33 N. E. 143 (1893) (bond and mortgage); *Poff v. Poff*, 128 Va. 62, 104 S. E. 719 (1920) (debt); *Executive Committee v. Shaver*, 146 Va. 73, 135 S. E. 714 (1926) (notes). Nor where there has been an attempted gift, incomplete for lack of delivery. *Noble v. Learned*, 153 Cal. 245, 94 Pac. 1047 (1908); *In re Ashman's Estate*, 223 Pa. 543, 72 Atl. 899 (1909); *Trubey v. Pease*, 240 Ill. 513, 88 N. E. 1005 (1909); *Cordoza v. Leveroni*, 233 Mass. 310, 123 N. E. 672 (1919); *Howard v. Dingley*, 122 Me. 5, 118 Atl. 592 (1922). The principal case is one on whose facts all courts would probably refuse to find an intent to create a trust.